IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5956 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

Deceased MADHJI KOYAJI ZALA, through his heirs and legal representatives Nos. 1/1 to 1/6.

Versus

MANGAJI GHELAJI PARMAR

Appearance:

1. Special Civil Application No. 5956 of 1992

MR JITENDRA M PATEL for Petitioner No. 1-1/6

RULE SERVED for Respondent No. 1,2/1,2/4-2/5

MR GM AMIN for Respondent No. 2/2

DELETED for Respondent No. 2/3

CORAM : MR.JUSTICE K.A.PUJ

Date of decision: 1/04/2003

CAV JUDGEMENT

The petitioners, in this petition, have challenged the orders passed by the revenue authorities,

namely Mamlatdar, Deputy Collector and the Gujarat Revenue Tribunal, Ahmedabad and have also prayed for quashing and setting aside the said orders.

2. The brief facts, giving rise to the present petition, are that the petitioner was in possession of the land bearing Survey No. 45 admeasuring 2 Acres and 19 Gunthas and Survey No. 40 admeasuring 0 Acre and 15 Gunthas, total New Block No. 28 admeasuring 2 Acres and 34 Gunthas situated in the Sim of Village Barmuvada, Taluka Mehmdavad, District-Kheda, by virtue of mortgage document dated 27.5.1970 executed by one Mangaji Ghelaji Parmar who was the owner and occupant of the said land. The possession of the said land was taken by the said original owner Mangaji Ghelaji pursuant to a valid and legal order of the Mamlatdar passed under the provisions of the Bombay Tenancy and Agricultural Lands Act. The petitioner was in possession of the said land since 1970. The Mamlatdar and ALT initiated proceedings under Section 32(1B) of the Bombay Tenancy and Agricultural Lands Act (hereinafter referred to as the "Act") and in the said proceedings no legal and valid notice was issued to the present petitioners even though the petitioner was in possession of the disputed land. It is stated in the petition that there was no evidence on record showing that the ingredients of Section 32(1B) of the Act were established by deceased Vajaji Andarji the respondent No.2 herein who claimed to be the original-tenant. Since the landlord has given the possession of the disputed land under mortgage document dated 27-5-1970, the land was not in possession of the landlord on 3.3.1973 and in this view of the matter the deceased respondent No.2 was not entitled to get the land under Section 32(1B) of the Act. Despite this, the Mamlatdar by his order dated 25.8.1980 has passed an order holding that the deceased respondent No.2 was entitled to restoration of the said disputed land.

3. Being aggrieved by the said order of the Mamlatdar, the petitioner had preferred Tenancy Appeal before the Deputy Collector and the Deputy Collector by his order and judgment dated 2-1-1982 had dismissed the appeal filed by the petitioner. Being further aggrieved by the said order of the Deputy Collector the petitioner filed Revision Application before the Gujarat Revenue Tribunal, being No. TEN.B.A. 715 of 1983 on 3-5-1983. The petitioner has explained the reasons for late filing of Revision Application before the Tribunal stating that the office of the Deputy Collector has not communicated the said judgment to the petitioner and the petitioner came to know about the said Judgment only when the

Talati-cum-Mantri of the village informed the petitioner on 13-4-1983 that he had to hand over the possession of the land to the respondents. The petitioner thereafter immediately applied for the certified copy which was delivered to the petitioner on 26.4.1983 and the Revision Application came to be filed on 3-5-1983. The Gujarat Revenue Tribunal, however, without deciding the issue on merits had rejected the Revision Application on the ground of limitation. It was observed by the Tribunal that if the Revision or Appeal is obviously time barred, it is the duty of the parties to give the reasons for the delay and to give some evidence for the same. At the most, an affidavit to this effect was to be filed. However, nothing was done in the case of the petitioner and hence there was no reason to consider the matter in time or no reason to condone the delay. Accordingly the Revision Application was dismissed as time barred, vide order dated 31-1-1989.

4. It is this order of the Tribunal which is under challenge before this Court under Article 227 of the Constitution of India. The petition was admitted by this Court on 4-1-1994. The legal heirs of respondent No.2 have filed their appearance and affidavit-in-reply was filed by one Mr. Udesinh Vajaji, legal heir of Vajaji Andarji Zala the deceased respondent No.2 herein. It is stated in the affidavit-in-reply that the Mamlatdar and Agricultural Land Tribunal has decided the case in favour of respondent No.2. The Mamlatdar had conducted detailed enquiry under Section 32B of the Act and after that detailed enquiry, the respondent No.2 was held to get possession of the disputed land. The said order of the Mamlatdar has been confirmed by the Deputy Collector and also by the Gujarat Revenue Tribunal. It was further stated that the requisite amount was deposited by the respondent No.2 under Section 32M of the Act and the Mamlatdar had also issued the certificate in his favour. It is further stated that necessary entry was also mutated in the name of respondent No.2. It is further submitted that since the enquiry was over and the requisite amount was deposited and the Entry was also mutated in favour of respondent No.2, the proceedings came to an end and therefore no Revision or Petition or Appeal could lie. It is further stated in the petition that the so-called mortgage dated 27-5-1970 was got-up and concocted. The said evidence was created only with a view to refute the legal rights of respondent No.2. It is further stated that even if it is assumed that the mortgage was existing the said disputed land vested in the Government without any encumbrance on the appointed date i.e., 1-4-1957 and all the rights of the landlord

have been extinguished by operation of law. The only right available to the landlord was to get compensation that can be determined by the Tribunal. The landlord has no right thereafter to create any encumbrance on the land in question. It is further stated that the said mortgage deed was only on Rs.100/= and the mortgage deed was not registered and hence the same could not be taken into account and more particularly when the mortgagee has only limited right. On the basis of these averments and contentions raised in the affidavit-in-reply it was stated that the petition deserves to be dismissed.

5. Heard Mr. JM Patel, ld. advocate appearing for the petitioners and Mr. GM Amin, ld. advocate appearing for the respondents. Mr. JM Patel has submitted that though the orders of revenue authorities below are challenged in the revision before the Tribunal on merits and reasons were given for late filing of revision, the Revenue Tribunal has rejected the revision merely on the ground of limitation without going into the merits of the matter. The Tribunal has also not considered the reasons given by the petitioner for condonation of delay. The order of the Deputy Collector was passed on 2-1-1982 whereas the Revision Application before the Revenue Tribunal was filed on 3-5-1983. It was stated by the petitioner that on 15-4-1983 he received the notice of handing over possession to the deceased tenant and so the petitioner came to know about the order for the first time. He thereafter applied for the certified copy which was delivered to the petitioner on 26-4-1983 and filed the Revision Application before the Tribunal which was in time. While rejecting the said revision on the ground of limitation, the Tribunal has observed that the petitioner has not filed any affidavit nor he filed any document or evidence in support of his case that he came to know about the order of the Tribunal only on 13.4.1983. It was further observed that though he was a party to the appeal and though the intimation regarding the judgment of the appeal might not have been sent to him, it was not believable that for more than one year, the petitioner would not enquire about the result of the appeal. It was further stated that even no application for condonation of delay was made by the petitioner nor any reason for the delay was given by the applicant nor any evidence was produced in support of the same. Considering all these points, the Tribunal has rejected the Revision without going into the merits of the matter. Mr. Patel has, therefore, submitted that the Tribunal was not justified in rejecting the Revision Application filed by the petitioner. In support of his submissions, he has relied on various decisions of this Court as well as of the

Hon'ble Supreme Court. Mr. Patel has relied on the decision of the Hon'ble Supreme Court in the case of N. Balakrishnan Vs. M. Krishnamurthy = (1998) 7 Supreme Court Cases 123, wherein it is held as under:

> "Condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. In every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time, then the court should lean against acceptance of the explanation. A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. The words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice."

6. Mr. Patel has further relied on the decision of this Court in the case of Alarakhiben Yakubbhai Vs. State = 1994 (2) GCD Page 28, wherein it is held as under;

> "No Court or Tribunal or quasi-judicial Authority in this country can blissfully remain ignorant and oblivous to the stark reality of our Indian polity. It was nobody's case that the delay on the part of the present petitioner in approaching the Appellate Authority was deliberate or with some ulterior motive. It did not remain unexplained. It is true that the petitioner did

not file any affidavit in support of her delay condonation application. It appears that she was not called upon to do so. She might have willingly filed an affidavit if she was required to do so. Simply because no affidavit has been filed is no ground to reject the delay condonation application unless the party refuses to file such affidavit even after called upon to do so or the procedural law requires it to be done. The Appellate Authority in his impugned order at Annexure-C to this petition has not stated that the petitioner did not file any affidavit in support of her delay condonation application despite giving her an opportunity to do so. The Appellate Authority has also not indicated in his order at Annexure-C to this petition that the procedural law governing appeals before him would require and affidavit in support of the delay condonation application. I think the impugned order at Annexure-C to this petition cannot be sustained in law. With respect, the Tribunal seems to have made the same mistake as made by the Appellate Authority culminating into the decision at Annexure-D to this petition. It has to be quashed and set aside. The matter will have to be remanded to the Appellate Authority for restoration of the appeal in question to file and for his fresh decision according to law in the light of this judgment of mine."

7. Apart from the above issue of limitation, Mr. Patel has submitted that the petitioners have a very strong case on merits as the respondent No.2 tenant has already handed over the possession to the landlord in the year 1961-62 and order to this effect was also passed under Section 32F of the Act. The tenant has not taken any action with regard to taking back the possession of the disputed land and hence the said proceedings were closed. These facts are duly recorded by the Mamlatdar while passing order under Section 32(1B) of the Act on 25.8.1980. The original landlord thereafter executed the mortgage deed in favour of the petitioner on 27-5-1970 and from that date onwards, the petitioner was in possession of the disputed land. The respondent landlord was therefore not in possession of the disputed land on the notified date, that is 3-3-1973. He has further submitted that the possession of the disputed land was voluntarily surrendered by the tenant and hence it cannot be said that the tenant was illegally dispossessed of the

disputed land. He therefore submitted that the tenant was not entitled to restoration of possession of the disputed land under Section 32(1B) of the Act. In support of this proposition, he relied on the decision of the Hon'ble Supreme Court in the case of Dhondiram Tatoba Kadam Vs. Ramchandra Balwantrao Dubal (Since Decd.) By His LRs. & Anr. = (1995) 36 (1) GLR Page 344, wherein it is held as under;

> "The Sec. 32(1-B) entitles a tenant to restoration of possession provided he was in possession on the appointed date, i.e., June 15, 1955 and was dispossessed before April 1, 1957 and his landlord was in possession on July 31, 1969. The section is, thus, in two parts creating right and the other entitling restoration of possession. Proceedings for restoration could take place either at the instance of the tenant or suo motu by the Tahsildar. But the order could be passed only if the primary requirements of tenant being in possession on the appointed date and his dispossession before April 1, 1957 were satisfied. The language of the latter part of the section directing the Tahsildar to take possession of the land from the landlord and restore it to the tenant who on restoration by operation of law becomes purchaser from the date of restoration are clear legislative indications to construe the section liberally in favour of the tenant. What happens if a tenant who satisfied the requirements as provided in the section is found to be in possession on July 31, 1969 ? Could he be evicted in any proceeding even though he satisfied the requirement of being in possession on the appointed date and was evicted before April 1, 1957 ? Would such construction of the section be in consonance with the spirit of the Act ? On the language the sub-section does not grant any protection to a tenant who was in possession on July 31, 1969. But reading the Section in such a narrow manner would be defeating the legislative objective of enacting a beneficient legislation endeavouring to make the tillers of soil as purchaser and owner. (Para 3).
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> The effect of surrender was that the appellant ceased to be tenant. Assuming that surrender was invalid and the appellant left the possession over land of his own accord, was the

> dispossession as contemplated in Sec. 32(1-B) of the Act ? Voluntary giving up of possession does not amount to dispossession unless the law provides for it. "Dispossess" according to Black's Law Dictionary means : "To oust from land by legal process; to eject, to exclude from reality". The dispossession should have been, therefore, either by legal process or by physical act of exclusion. It would not include leaving possession voluntarily or by surrender. The appellant, therefore, did not satisfy the second requirement. Consequently, he did not become purchaser of the land under Sec. 32(1-B) of the Act. (Para 4)".

Mr. Patel has further submitted that Section 32B of the Act deals with power of the Collector to resume and dispose of the land not purchased by tenant. However, the said provision is not applicable to the facts of the present case, as Section 32B(2)(b) as it existed prior to the Gujarat 36 Act of 1965 which says that the land shall, subject to the provisions of Section 15, be surrendered to the landlord. Section 15 of the Act deals with termination of the tenancy by surrender thereof and as per the said Section a tenant may terminate the tenancy in respect of any land at any time by surrendering his interest therein in favour of the landlord, provided, that such surrender shall be in writing, and verified before the Mamlatdar in the prescribed manner. Here in the present case, the land was voluntarily surrendered by the tenant in the year 1961-62 and a necessary order under Section 32F was also passed by the Mamlatdar. He has therefore submitted that the Collector cannot resume and dispose of the land in question while exercising the powers under Section 32F of the Act. Mr. Patel has further submitted that the suo motu proceedings initiated by the Mamlatdar in the year 1979 are hopelessly barred by limitation. He has further submitted that under Rule 15A of the Bombay Tenancy and Agricultural Lands Rules, 1956, period is prescribed within which application under sub-section (1B) of Section 32 is required to be made. It states that an application under sub-section (1B) of Section 32 by a tenant specified in that sub-section shall be made within a period of one year from the coming into force of the Bombay Tenancy & Agricultural Lands (Gujarat) Amendment Act, 1972. Here in the present case, from the record it is found that no such application is made by the tenant. However, the Mamlatdar has initiated suo motu proceedings under Section 32(1B) of the Act in 1979 which is much

after the period of 7 years from the date when the Act has come into force. The said suo motu proceedings and the order passed by the Mamlatdar are therefore required to be quashed and set aside.

8. Mr. Patel has further relied on the decision of this Court in the case of Pravinchandra Harmanbhai Patel Vs. Chunibhai Govindbhai Patel in Special Civil Application No. 6046 of 1990 decided on 7-12-2000, wherein this Court has held that the condition of dispossession, namely forcible dispossession was not proved by the tenant. Consequently, he was not entitled to get back the land in dispute from the landlord. The three orders being patently illegal were quashed and set aside.

9. Mr. Patel has further relied on the decision of this Court in the case of Chimanbhai B. Patel Vs. Heirs of Mathurbhai Jesangbhai in Special Civil Application No. 2342 of 1990, wherein it is held as under;

> "6. The learned Single Judge of this Court in Special Civil Application No. 6046 of 1990 (Pravinchandra Harmanbhai Patel v. Chunibhai Govindbhai Patel), decided on 7-12-2000, followed the ratio of the Supreme Court Judgement while referring to the earlier judgements of this Court in Bhailalbhai Govindbhai v. Bai Nanduba wd/of Gulabsing Mohansing, reported in 18 GLR 901, in which it was held that, even assuming that the tenant was persuaded to surrender his tenancy since the surrender was not in accordance with the provision of the Tenancy Act and possession had not been obtained either under section 29 or any other provision of the Tenancy Act, the landlord cannot succeed. Obviously, the ratio of the decision of the Supreme Court would govern the case and the earlier decisions of this Court to the extent that its ratio conflicts with the decision of the Supreme Court in Kadam's case (supra) would no longer be a good law, as rightly assumed by the learned Single Judge, while deciding Special Civil Application No. 6046 of 1990."

10. Based on the aforesaid circumstances as well as the judicial pronouncements, Mr. Patel has submitted that the orders passed by all the three Revenue authorities below are void and illegal and hence they are

required to be quashed and set aside.

11. On the other hand, Mr. GM Amin, ld. advocate appearing for the respondent submitted that all the three authorities have concurrently decided in favour of the respondents and since there being concurrent finding of fact, this Court should not exercise its extraordinary writ jurisdiction under Article 227 of the Constitution of India by interfering in the said concurrent finding of facts. He has further submitted that several disputed questions of facts are involved in the present petition. Firstly, he has submitted that the very document, namely, Deed of Mortgage on which heavy reliance was placed, is not a genuine document as it is neither registered nor executed on the requisite stamp papers. He has further submitted that there is no evidence whatsoever to prove the fact that the tenant has voluntarily surrendered the possession of the disputed land to the landlord. He has further submitted that not only the Revision Application was filed late before the Gujarat Revenue Tribunal but the present petition was also filed very late before this Court. The petitioner is therefore in the habit of initiating legal proceedings very late without any reasons. The Tribunal has therefore rightly rejected Revision Application on the ground of delay and latches. As far as the registration of the document is concerned, Mr. Amin has relied on the decision of the Hon'ble Supreme Court in the case of United Bank of India Ltd. Vs. Messrs Lekharam Sonaram and Co. and Others = AIR 1965 S.C. 1591, wherein it is held as under;

> "When the debtor deposits with the creditor title deeds of his property with an intent to create a security the law implies a contract between the parties to create a mortgage and no registered instrument is required under S. 59 as in other classes of mortgage. It is essential to bear in mind that the essence of a mortgage by deposit of title deeds is the actual handing over by a borrower to the lender of documents of title to immovable property with the intention that those documents shall constitute a security which will enable the creditor ultimately to recover the money which he has lent. But if the parties choose to reduce the contract to writing, this implication of law is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are

essential ingredients in the creation of the mortgage. It follows that in such a case the document which constitutes the bargain regarding security requires registration under S. 17 of the Indian Registration Act, 1908, as a non-testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards. If a document of this character is not registered it cannot be used in evidence at all and the transaction itself cannot be proved by oral evidence either."

12. As far as the late initiation of suo motu proceedings under Section 32 (1B) of the Act is concerned, Mr.Amin has relied on the decision of this Court in the case of Rasulmiya Rehmanmiya Vs. Patel Lalabhai Shankerbhai = AIR 1984 Gujarat 27, wherein it is held as under;

"Such a time barred application has no legal efficacy and consequently on that application the Mamlatdar has no jurisdiction to proceed on merits. Still the Mamlatdar decided the matter on merits. That act on the part of Mamlatdar shows that he thought it proper not to throw out the application on ground of limitation and shut out the enquiry but to proceed with the same on merits suo motu. This application only served as a reminder to Mamlatdar to initiate proceedings suo motu and to proceed on merits of application. It seeks to do nothing else but to inform Mamlatdar about the injustice done to tenant. As the Mamlatdar entertained on merits the time barred application and adjudicated the matter it can be legitimately presumed that he had exercised his suo motu powers which are not subject to any period of limitation. The proceedings as conducted before the Mamlatdar are maintainable in law as being exercised under suo motu powers and are not barred by limitation."

13. Mr. Amin has further submitted that the petitioner is merely a mortgagee and he has no locus standi to file the petition before this Court. He has further submitted that his rights as a mortgagee were extinguished on the appointed date and a very limited right remains thereafter which is in the nature of

foreclosure or redemption of the mortgage. In support of this, he relied on the decision of the Hon'ble Supreme Court in the case of Amrit Bhikaji Kale and Others vs. Kashinath Janardhan Trade and another = AIR 1983 SC 643, wherein it is held as under;

> "On the tillers' day, the landlord's interest in the land gets extinguished and simultenaously by a statutory sale without anything more by the parties, the extinguished title of the landlord is kindled or created in the tenant. That very moment landlord-tenant relationship as understood in common law or Transfer of Property Act comes to an end. The link and chain is broken. The absent non-cultivating landlord ceases to have that ownership element of the land and the cultivating tenant, the tiller of the soil becomes the owner thereof. This is unquestionable. The landlord from the date of statutory sale is only entitled to receive the purchase price as determined by the Tribunal u/s. 32-G. In other words, the landlord ceases to be landlord and the tenant becomes the owner of the land and comes in direct contact with the State. Without any act of transfer inter vivos the title of the landlord is extinguished and it created simultaneously in the tenant making the tenant the deemed purchaser."

14. On the basis of the aforesaid submissions as well as the decisions cited by him, Mr.Amin has submitted that this Court should not entertain the present petition while exercising its extraordinary writ jurisdiction under Article 227 of the Constitution of India and also looking to the factual scenario of the present matter.

15. After having heard the ld. advocates appearing for the respective parties and after having considered the facts and circumstances of the case and the pleadings of the parties, and after having perused the documents produced before me as well as after having given my anxious thoughts to the various authorities referred to and relied on by the ld. advocates for the parties, I am of the view that there are several issues which are required to be decided in the present petition. However, the authorities below have not applied their mind to these issues and the Revenue Tribunal has also not considered the entire matter on merits and simply rejected the Revision Application on the ground of delay

and latches. I am, therefore, of the view that instead of giving any finding on merits or expressing any opinion on the issues raised before me at this juncture, it would be in the interests of justice to remand the matter back to the Tribunal for disposal of the revision on merits. While arriving at this conclusion, I am of the opinion that the Tribunal has committed an error by rejecting the revision application only on the ground of delay and latches. The petitioner has given a legitimate reason in the application itself as to why revision application was filed late. When party is not served with the order passed by the Tribunal, it cannot be expected from him that he was aware about the order. The petitioner has specifically stated in the application that he came to know about the order passed by the Tribunal only when the possession was demanded from him by the Talati-cum-mantri and thereafter he immediately applied for the certified copy and on receipt of the certified copy the revision application was filed before the Tribunal. Such an explanation cannot be thrown away on the ground that it is not believable. Non-filing of affidavit or not leading any evidence in respect of the averment to the effect that it was not aware about the outcome of the appeal cannot be a good ground in my opinion to reject the application. With regard to condonation of delay, the court is always lenient and it is more so especially when the delay is neither deliberate nor intentional nor it is malafide. Considering the facts and circumstances of the case, I hereby quash and set aside the order passed by the Tribunal and restore the matter to the file of the Tribunal to decide it on merits after giving adequate opportunities to the parties to the proceedings and while deciding the said revision application on merits the Tribunal would take into consideration the observations made by me in the foregoing paragraphs of this judgment.

16. With these observations and directions the petition is allowed. Rule is made absolute to the above extent with no order as to costs.

rmr. [K.A. Puj, J.]

At the time of pronouncement of the Judgment, both the learned advocates appearing for the respective parties have made a request that a suitable direction may be given to the Tribunal for disposing of the matter within a specified time limit. Considering this, the Tribunal is hereby directed to decide the matter, as expeditiously as possible, preferably within a period of

three months from the date of receipt of the certified copy of this Judgment or from the date of receipt of the writ from this Court whichever is earlier.

rmr. [K.A. Puj, J.]